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—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

OCTOBER TERM, 1905

THE TERRITORY OF NEW MEXICO, Ex Rel. E. J. McLEAN & COMPANY,
Appellants,
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY,
Appellee.

No. 18

Appeal from the Supreme Court of New Mexico

BRIEF OF APPELLANTS.

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OCTOBER TERM, 1905.

THE TERRITORY OF NEW MEXICO, EX REL. E. J. McLEAN & COMPANY, *Appellants,*

vs.

THE DENVER & RIO GRANDE RAILROAD COMPANY, *Appellee.*

No. 212.

APPEAL FROM SUPREME COURT OF NEW MEXICO.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

On September 7th, 1901, Mr. L. A. Hughes, as the agent for E. J. McLean & Company, tendered for shipment over the defendant company's railroad, one bale of dry hides weighing 920 pounds, and containing

46 hides, consigned to E. J. McLean, Denver, Colorado. The hides were delivered upon the platform of the defendant's depot at Santa Fe, New Mexico, the freight was tendered, but the defendant's agent declined to export them as consigned because said bale of hides had not been inspected and tagged, and ten cents per hide paid for inspection fees.

Defendant is a common carrier engaged in carrying freight and passengers between points within the Territory of New Mexico and without. It operates a line of railroad from Santa Fe, where said hides were tendered, and Denver, Colorado, the point of destination. The defendant owed a common carrier's duty to take and receive and transport all freight for the public, including these hides, unless it can show some excuse for its refusal to perform said duty. Its excuse was that said hides had not been inspected in accordance with Sections 3 and 4, Chapter 45, Acts of the Territorial Legislative Assembly of 1901. If this act was constitutional, the defendant's excuse was valid; otherwise not. We are only concerned with these two sections of the act in question, and they are as follows:

"Sec. 3. Hereafter it shall be unlawful for any person, firm or corporation to offer, or for any railroad company, or other common carrier to receive, for the purpose of shipment or transportation beyond the limits of this Territory, any hides that have not been inspected and tagged by a duly authorized inspector of the Cattle Sanitary Board of New Mexico, for the district in which such hides originate. For each hide thus inspected there shall be paid by the owner or holder thereof, a fee or charge of ten cents, and such fee or charge shall be a lien upon the hides thus inspected, until the same shall have been paid. Each inspector of hides shall keep a complete record of all inspections made by him, and shall at once forward to the Secretary

of the Cattle Sanitary Board, on blanks furnished him for that purpose, a complete report of each inspection, giving the names of the purchaser and shipper of the hides, as well as all the brands thereon, which said report shall be preserved by the Secretary as a part of the records of his office.

"Sec. 4. Any person, firm or corporation, common carrier, railroad company or agent thereof, violating any of the provisions of this act or refusing to permit the inspection of any hides as herein provided, shall upon conviction thereof, be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding one thousand dollars for each and every violation of the provisions of this act."

The Appellants have made and filed the following:

ASSIGNMENT OF ERROR.

Now come the appellants in the above entitled cause and show the Court here that in the record, proceedings and decree of the Court below there is manifest error to the prejudice of these appellants, in this, to-wit:

That the Supreme Court of the Territory erred in refusing to reverse the judgment of the District Court for the errors pointed out by the appellants in the assignment of error filed in that Court; said errors committed by the District Court having been assigned and they are repeated here as reasons why the Supreme Court of the Territory should have reversed the judgment of the District Court, and are as follows, to-wit:

1. That the court erred in sustaining the motion of respondent to quash the writ of mandamus in said cause.

2. That the court erred in dismissing the said action.

3. That the court erred in refusing to grant its peremptory writ of mandamus.

4. That the court erred in granting judgment in favor of respondent and in failing to grant judgment in favor of plaintiff and relator,

5. That the court erred in many and divers other respects apparent on the record.

(*See Record, page* 18).

Wherefore said appellants pray that said record may be seen and examined by this Honorable Court; that the said cause may be reversed and the judgment of affirmance by the Supreme Court and the judgment of the lower Court annulled; and that these appellants may be restored to all things which they have lost by reason thereof; and that said cause be remanded, with proper directions to the Court below.

POINTS AND AUTHORITIES.

I.

A REVIEW OF THE LEGISLATION OF NEW MEXICO CONCERNING THE CATTLE SANITARY BOARD, AND ITS VARIOUS FUNCTIONS.

We agree with the theory of law applied by the Supreme Court of New Mexico, in this case, that all legislation upon the subject of hide inspection in New Mexico, and the organization and existence of the Cattle Sanitary Board, should be looked into and construed together with this enactment, so far as the same may appear to be *in pari materia*. We will briefly, therefore, collate the New Mexico statutes bearing upon the subject.

All the statutes touching "hide inspection," directly or indirectly, are the following:

1st. The Act of the Legislative Assembly of 1889, contained in the Compiled Laws of 1897 as Secs. 181 to 206, creating the Cattle Sanitary Board. See preamble, reciting the creation of the Board "For Sanitary Purposes Only."

The preamble is very lengthy and recites the condition of disease being imported into the Territory by the bringing in of cattle and then proceeds:

"And whereas, the fact has become well established that such imported cattle, so as aforesaid communicating such Texas or splenic fever, never show any symptoms of the disease from which the same may be determined by an inspection thereof.

"And whereas, certain other contagious and infectious diseases, and particularly contagious pleuro-pneumonia, have been and are existing an epidemic among the cattle in certain localities within the United States and beyond the limits of said Territory; therefore for sanitary purposes only:

"Be it enacted, etc."

The whole act is too lengthy to quote in full but it empowers the sanitary board to take steps to prevent the introduction of diseased cattle, to employ a surgeon; to provide books of account; and the governor to issue proclamations; punishes the violation of the quarantine laws; authorizes the employment of assistance to aid in the enforcement of the quarantine laws; authorizes the board to make rules and regulations; and authorizes the seizure of cattle and the slaughter of diseased cattle and payment to the owner therefor except in certain cases; provides for the payment of expenses and of employees, etc., out of the fund raised by the act; and for a tax upon all cattle in the Territory.

2nd. The act of Legislative Assembly of 1891, contained in the Compiled Laws of 1897 as Secs. 207 to 219, giving the board certain additional powers. These powers embrace the first refer-

ence in the laws to any inspection of hides.

The act provides that the board may make all necessary rules and regulations prescribed by the act, and also such rules and regulations respecting the inspection of cattle intended for shipment, or to be driven beyond the limits of the Territory; and also respecting the inspection of hides and slaughter houses, and for the government of employees of the board.

Sec. 209 provides for the inspection of brands on cattle shipped or driven out of the Territory, and for the preservation of a record, in the office of the Secretary of the Board, of the results of such inspection, and what the record shall contain.

Sec. 210: Shippers shall hold the cattle at some convenient place for inspection before shipping.

Sec. 211 makes it a misdemeanor for any railroad company to receive for shipment until furnished with a certificate that the cattle have been inspected.

Sec. 212 prescribes duties of the inspectors.

Sec. 213 imposes additional duties on inspectors—among them the inspection of all slaughter houses, and of all hides in slaughter houses, and for a comparison of brands on them with the records kept at the slaughter houses.

Sections 214, 215, 216, 217 and 218 relate to recording of brands by the owners; evidence; giving of false certificates; compensation of secretary; salaries of employees; and penalties for violation of the act.

3rd. The Act of the Legislative Assembly of 1893, contained in the Compiled Laws of 1897 as Secs. 220 to 225, concerning the raising of general funds for the Cattle Sanitary Board, and providing in one section, No. 221, that the board might fix a fee or charge for the inspection of hides inspected under the provisions of the act—i. e.,

hides inspected at slaughter houses.

Sec. 220 expressly provides for the payment of indebtedness created by the board, shall "be paid out of revenue accruing to the Cattle Indemnity Fund for taxes levied and assessed upon cattle only, and from fees arising from inspection of cattle and hides, as hereinafter provided, and not otherwise."

Sec. 221 gives the board the power to fix the fees for the inspection of cattle and hides.

Sec. 222 provides that all inspection fees shall be paid to the Secretary of the Board and shall by him be transmitted to the Territorial Treasurer, to be placed to the credit of the Cattle Indemnity Fund.

4th. The Act of the Legislative Assembly of 1899, contained in ch. 44, p. 94, Session Laws of 1899, requiring persons offering to butchers dressed meat for sale, should exhibit the hide; and the butcher should keep a record of the brands, etc., thereon.

5th. The Act of the Legislative Assembly of 1899, contained in ch. 53, p. 106, Session Laws of 1899, fixing a fee of three cents per head for inspection of cattle, and repealing Sec. 221 C. L. '97 (being from the laws of 1893), which section was the one that permitted the board to charge or fix a fee for inspection of hides inspected at slaughter houses.

6th. The Act of the Legislative Assembly of 1901, being the one requiring an inspection to export hides by railroad or common carrier, with a tagging thereof, and a fee of ten cents. Quoted above in full.

7th. Sections 84 and 85 of the Compiled Laws of 1897 require butchers to give bonds, to keep records of brands, etc., of all animals slaughtered. Prescribes a penalty for failure to comply with the act. Makes the record the butcher is required to keep, open to the inspection of all persons, and

requires the butcher to keep the hide itself for a period of thirty days.

It will be found upon an examination of this legislation, that there is very little upon the subject of the inspection of hides, and that there is in fact no comprehensive or general system of hide inspection in the Territory for hides bought and sold in the local markets. For local purposes, Sections 84 and 89 of the Compiled Laws of 1897 have evidently been deemed sufficient by the Legislature, and it is provided by them that all persons butchering or killing stock or cattle shall keep the hides thirty days after the killing, and *during said time* shall permit any examination that any inspector, sheriff or other officer may desire to make.

To recapitulate this legislation: By the first law, passed in 1889 (C. L. '97, Secs. 181 to 206), the Cattle Sanitary Board was first brought into existence, "for sanitary purposes only," without a reference in said act to any class of inspection, or to hides, or to cattle inspection. By the second law, that of 1891 (C. L. '97, Secs. 207 to 219), there is made the first reference to hides and inspections, as follows:

In Section 208 (C. L. '97), the Board is given power, "in the exercise o fthe duties conferred and prescribed by this act . . . to make rules and regulations respecting the inspection of cattle . . . and *also respecting the inspection of hides and slaughter houses* in this Territory . . ."

In Sec. 213 (C. L. '97): "Every inspector employed by the sanitary board . . . shall in addition to the duties prescribed . . . be an inspector of brands and ear-marks and *also an inspector of hides and slaughter houses under the provisions of this act*, . . . and shall . . . inspect the brands and ear-marks of all cattle

transported or driven out of this Territory . . .; *every slaughter house* in this Territory shall be carefully inspected by some one of the inspectors aforesaid, and all hides found in such *slaughter houses* shall be carefully *compared with the records of such slaughter houses*, and a report in writing setting forth the number of cattle killed at any such slaughter house since the last inspection . . . the names of the persons from whom each of said cattle was bought, the brands and marks upon each hide, and any information that may be obtained touching the violation by the owner of any such slaughter house or any other person of . . . Section 84 (C. L. '97)."

This is all there is in the said legislation (except the act of 1901), relating to inspecting hides. It was provided in 1893 (Secs. 221 C. L. '97), that the Board might fix a fee or charge for inspecting hides; but this section was repealed as shown above, by ch. 53, Laws of 1899. So that, when the law of 1901 under discussion was enacted, there was nothing requiring the inspection of hides as a preliminary to local commerce therein. The only statutes, those above mentioned, confine themselves to an "inspection of hides and slaughter houses," always coupling the two; giving to the Board only power to make rules and regulations relating to *such* inspection "as prescribed in said act"—i. e., in the inspecting of "hides and slaughter houses," which inspection was also shown to be for the sole purpose of comparing the hides at the slaughter house with the records of the slaughter house, and for the purpose of detecting violations of Section 84 C. L. '97. This section is the one that requires the keeping of the hide for thirty days after the killing.

It is plain that these laws prescribe no inspection except that of slaughter house hides, and that for a dis-

tinct purpose.

As was said by the New Mexico Supreme Court, in passing upon this status of the local enactments, in this case (Territory vs. D. & R. G. R. R. Co., 78 Pac. Rep., p. 75):

"If, then, the legislative department of the government of the Territory has determined that the owners of cattle in the Territory of New Mexico ought in justice, and in order to bear their just and fair share of the public burdens, to pay a tax of ten cents per head upon each animal slaughtered in the Territory, and has so provided by statute, we can see no reason why such legislation must not be upheld. But an examination of every section of the statute relating to the subject under discussion fails to convince us that the Legislature has so provided. It is true that every person killing a bovine animal in New Mexico is required by law to keep the hide for thirty days free to the inspection of the Cattle Sanitary Board, but nowhere can there be found any requirement of law for any inspector or person to visit any place for the purpose of inspection of hides except slaughter houses. It is provided in the statute that slaughter houses shall be inspected once every thirty days, and we assume that the inspector is authorized under Section 3, ch. 45, p. 96, of the act of 1901, to charge therefor the sum of 10 cents. But it is not made his duty to visit and inspect hides in any other place or places in the Territory. While it is true that the individual is required to keep the hide for thirty days, so as to permit inspection, it is entirely optional, so far as any requirement of law is concerned, with the inspector, as to whether he visits any place except a slaughter house. It is a matter of common knowledge that large numbers of cattle are killed in this Territory by people not in slaughter houses, and it cannot be said, therefore, that a tax of ten cents per hide is levied upon each hide in the Territory. No intention, therefore, of the Legislature to tax hides of animals killed in places other than slaughter houses,

and not intended for export, can be drawn from the various statutes on the subject."

See Trans. p. 25.

This is the construction of the New Mexico Supreme Court, upon the very laws in question; and it is conclusively fixed that hides, out of a slaughter house, or in a slaughter house after thirty days age, were under no disability as articles of commerce, except for the period of thirty days after the killing. *Expression unius est exclusio alterius*; and the requirement to withhold hides from trafficking for thirty days, qualifies them for commerce and traffic after that time. Hides, therefore being after thirty days' age free articles of commerce in New Mexico, with all power to inspect the same or to charge a fee thereon, or to withhold the same from commerce, absolutely determined, and being free in every sense—the law of 1901, attacked by this proceeding, was passed, taxing their exportation.

Construed in the light of the foregoing, there is very little in the old laws which can be said to be in *pari materia* with the law of 1901, as regards hide inspection. A new, different, and additional inspection and charge is imposed by the law of 1901, on a thing already an article of commerce, when offered for exportation. A hide already "*inspected*," that is, *compared* at a slaughter house, or anywhere else, under the old statutes, must be re-inspected at the port of shipment or exportation. Its old inspection is not the inspection called for by the law of 1901, for exportation purposes; its old inspection gave it no tag, nor could the inspection of a hide in the hands of the killer, in the little Mexican hamlet, or on the range, or even at the slaughter house, give the name of the "shipper"—one of the essentials of the "inspection" under the law of

1901. Hides more than thirty days old can be bartered and sold in the Territory without hindrance. After that time, no inspector can compel a holder of hides to submit them to inspection of any sort, nor can he charge any fee, unless the holder brings them to the port for exportation. The statute of 1901 exclusively provides for an "*exportation inspection;*" and would require the reinspection and tagging of hides even already inspected under the old statutes. The penalty of the law is only that hides shall not be exported until tagged—not that they shall not be trafficked in the local markets.

II.

THE NEW MEXICO STATUTE UNDER CONSIDERATION IS NOT AN "INSPECTION LAW."

The law of 1901 is not an *inspection law* within the meaning of the exception found in the Constitution of the United States, Article I, Sec. 10, paragraph 2, reading as follows:

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . ."

This brings us at once to the inquiry as to what is an inspection law. The District and Supreme Courts of New Mexico have, as we understand it, confused some of the underlying principles applicable to the questions concerned in this case. By them, the police power has, for instance, been coupled with inspection laws. Inspection laws may be an exercise of the police

power, or they may not. No so-called inspection law can be held valid as a proper exercise of the power of States, by calling it the exercise of the police power. It is either an inspection law, or it is not. We analyze the above section as meaning that the state is prohibited from laying any duties on imports or exports, without the consent of Congress; but that, despite this prohibition the state may lay such imports or duties where absolutely necessary for executing its inspection laws. It is also provided in the same section that the net product of all duties and imports laid by any state shall be for the use of the Treasury of the United States.

In Gibbons vs. Ogden, Chief Justice Marshal (9 Wheat., 1), says:

"The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use."

In Brown vs. Maryland (12 Wheat., 419), it is said:

"An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is not usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then,

is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied ,while the article is entering the country, but extends to a duty levied after it has entered the country . The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is 'except what may be absolutely necessary for executing its inspection laws.' Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act on importations, they are generally executed on articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition of the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition."

The propositions so made, by Chief Justice Marshall, have never been disputed or modified; yet in the trial court in this case the power to levy this duty for inspection purposes was confused with the general power of taxation. It is clear that such a tax as is complained of in the case at bar, cannot be levied unless it clearly comes within the definition of inspection laws, and then only for the amount absolutely necessary for the execution of such laws.

Under the law in question, only hides offered for the purpose of shipment beyond the limits of the Territory are subjected to the "inspection"—and the tax. In the language of Chief Justice Marshall, the duty is levied on the article itself, not on the act of importation or exportation, and can only be justified under the Constitution by bringing it within the exception we are considering . It is plain that the shipper cannot ship

until he has had his hides tagged and paid his fees. It is equally plain that he is not required to do this at all unless he offers the hides to a common carrier for shipment to a point beyond the Territorial boundaries. It is true that the Territorial Courts have, in approaching this matter, discussed it under the interstate commerce clause of the Constitution, and not the inspection clause; but it seems plain that to hold that a commodity cannot be shipped out of the Territory without the payment of a special duty and charge, whether exacted at the warehouse of the shipper, or on the platform, or in the depot, or in the carrier's cars, is unquestionably an interference with commerce between the states, and with the exclusive right of Congress to lay duties on exports. It is to be borne in mind that there is no claim that this inspection charge is a tax levied under the general taxing power of the Territory. These hides were subject to general taxation, and presumably paid taxes like all other property; and the money or other article received for them in exchange would likewise become a part of the general mass of taxable property in the Territory.

We are brought back always to a consideration of the proposition as to whether this is in fact an inspection law, and whether the charges exceed the amount absolutely necessary for its execution.

The Statute of 1901 of New Mexico being shown clearly to be an innovation in the Territory's legislation on the subject, and being in fact the only "inspection law" for the examination of hides, it is interesting to inquire what this alleged inspection does. The data taken by the inspector, under the law, gives "the names of the purchaser and shipper of the hides, as well as all the brands thereon." How this fits the hides for ex-

portation, how it preserves the credit of the Territory, how it protects any person from deceit or fraud as to quality, weight or value of the hides, cannot be seen. By the decision of the New Mexico courts, these matters have all been waived, and it is said that the law is an inspection law, for the detection or prevention of crime, in the cattle industry. We will later discuss the wrong of taxing one article of commerce, or one class of property, for the protection or benefit of another and distinct property or line or enterprise. But we submit, that the statute in question does nothing for the protection of property. In the case at bar, forty-six hides are offered for shipment. "The inspection" to be made would ascertain the name of the relator as shipper, and the name of relator also as consignee, and the various brands appearing on the hides. It would appear by the report that the relator had shipped or exported out of the Territory forty-six hides, branded A., B. and C. It would not appear whence relator obtained them, nor could their title be traced in any way. Remembering that hides are a legitimate article for local commerce; that they pass in the markets, without bill of sale; and even assuming that a hide marked "A" had been stolen from a butcher in some remote part of the Territory, its identity with the one exported could not be established. Assuming that three cattle, branded "B", had been killed by thieves, would the fact that a dry hide of that brand had got into the market, and had been exported by the relator in this case, assist the prosecution of a disconnected crime, in any conceivable way? There is no power in this law to detain a suspected hide, nor to seize one which corresponds in brand with the brand upon another out of a possible thousand, which one may have been stolen. The exportation of

the hide, honest or dishonest though it may be, results immediately from the tagging and taxing by the Cattle Sanitary Board, and, instead of preventing crime, if wrong has been done it is facilitated and assisted by the removal of the property from the Territory under official sanction.

But the prevention and detection of crime has never yet been pointed out by any other court as the legitimate purpose of an inspection law. The court, by Mr. Justice Miller, in 107 U. S., 61, People vs. Compagnie Gen. Transatlantique, says:

"Another section provides for the custody, the support, and the treatment for disease of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection? In fact, these statutes differ from those heretofore held void only in calling them in their caption 'inspection laws,' and in providing for payment of any surplus, after the support of paupers, criminals, and diseased persons, into the treasury of the United States . . . a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never exist. A state cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title."

We emphatically say that a search after evidence by the inspection of a hide is no more the legitimate purpose of an inspection law than the examination of the possible thief would be. We will show before we conclude that its principal object is to collect a revenue to defray the expenses of the Cattle Sanitary Board, and is a tax levied on one class of property and citizens engaged in one line of business, for a questionable and vague benefit to the property of another class.

In Leisy vs. Hardin, 135 U. S., 112, there is contained an approval of the early definition of Chief Justice Marshall, as to what is properly an inspection law. Quoting from Bowman vs. Chgo. Ry. Co., 125 U. S., 465, the court says:

"'If, in the present case,' said Mr. Justice Matthews, 'the law of Iowa operated on all merchandise sought to be brought from another state into its limits, there could be no doubt that it would be a regulation of commerce among the states,' and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of Congress on the subject of interstate commerce by means of railroads, designed to remove trammels upon transportation between different states, and upon the subject of transportation of passengers and merchandise, including the transportation of nitro-glycerine and other similar explosive substances, . . . is referred to as indicative of the intention of Congress that the transportation of commodities between the states shall be free, except where it is positively restricted by Congress itself, or by states in particular cases by express permission of Congress. It is said that the law in question was not an inspection law, the object of which is 'to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use; Gibbons vs. Ogden, 9 Wheat., 1; Turner vs. Maryland, 107 U. S., 38, 55); nor could it be regarded as a regulation of quarantine, or a sanitary provision for the purpose of protecting the physical health of a community; nor a law to prevent the introduction into the state of diseases, contagious, infectious or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce, prohibited by the Constitution; and the observations of Mr. Justice Cat-

ron, in The License Cases, 5 How., 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the state to bring within the police power 'any article of consumption that a state might wish to exclude.'"

In Burnill's Law Dictionary, "Inspection" is defined thus:

"Official view or examination of commodities or manufactures to ascertain their quality, under some statute requiring it."

In Bouvier's Law Dictionary, this is the definition:

"The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce."

In Clintsman vs. Northrop, 8 Cow., (N. Y.) 45, the inspection laws of New York are said to be laws "to protect the community, so far as they apply to domestic sales, from fraud and impositions, and, in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.

See 16 Am. & Eng. Ency. Law, 808, and note.

"It does not at all follow that every (state) statute, enacted ostensibly for the promotion of (certain) ends, is to be accepted as a legitimate exertion of the police powers of a state. There are, of necessity, limits beyond which (state) legislation cannot rightfully go. The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry, whether the legislature has transcended the limits of its authority. If therefore a statute purporting to have been enacted to protect the public health, the public

morals, or the public safety has no real substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

"It is equally true, however, that inspection laws, to be within the sovereign prerogative of the state, and to stand superior to cardinal provisions of the national Constitution, must be essentially and really such in character, purpose and operation. To call a law an inspection law does not make it one, competent to override any tenet of Constitutional law. It must be an inspection law in spirit and in truth, in order that its character as such shall be respected; and even though it be, in its essence and design, an inspection law, yet, in order that it may not be subordinated to the provisions of the Constitution establishing the freedom of interstate commerce, it must be a 'reasonable law,' properly devised for preventing the evil at which it is aimed; so devised as to no more than effectuate that purpose, and as not to subserve other objects unessential to the public safety. When inspection laws are abused for the latter ends, and thereby affect foreign commerce and trade between the states, it is competent for the national courts—it is made our solemn duty—to pronounce them invalid and to forbid their enforcement.

"And so, it seems to me, the question at bar is resolved into the inquiry whether or not the meat inspection law of Virginia is reasonable and necessary, is directed against a dangerous evil, has an eye single to the prevention of that evil, and provides for the prevention in a manner less injurious to the Constitutional rights of citizens of our sister states than any other that could be devised. The first inquiry is, whether this law was necessary to the public health and safety. Surely no public emergency, no prevalent epidemic, no general danger, or popular apprehension of danger existed to render a law 'absolutely necessary' or at all necessary, such as has never before been passed in the

history of the commonwealth. The law does not purport on its face to have been necessary to public safety; and I am of the opinion that it was not so. But even if it were, is it 'reasonable' in its provisions?"

Mugler vs. Kansas 124, *U. S.* 623.

Does any general danger, any popular apprehension of danger, from the stealing of hides, appear in New Mexico? Clearly not, for there is no vigilant inspection law, for the tracing of hides intended for local commerce, local tanneries, or local manufacture. The exercise of police power, for the detection of crime, is only thought necessary when exportation, or commerce between the states, is set in motion. As stated before, this is purely an exportation charge, purely an exportation inspection, an inspection for the taking of the shipper's name—and there can be no shipper within the meaning of this law of 1901, without an offer for extra Territorial shipment; and this "inspection" must be made in addition to any that may have been made under the previous laws, when the hide is offered for export. A hide thirty days old, is exempt from inspection when sold in the Territory; but, even though already inspected, it has to undergo another inspection, when offered for export.

"Of course, they cannot be taxed as exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any state, without the consent of Congress, from laying any imposts or duties on imports or exports; and although it has been decided, in Woodruff vs. Parham, 8 Wall., 123, that this clause relates to imports from and exports to foreign countries, yet when such imposts or duties are laid on imports or exports from one state to another, it cannot be doubted that such an

imposition would be a regulation of commerce among the states, and therefore be void as an invasion of the exclusive power of Congress."

Coe vs. Errol, 116 *U. S.,* 525.

"There is another view on this subject however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided, in Coe vs. Errol, 116 U. S., 517, that goods intended for exportation to another state are liable to taxation as part of the general mass of property of the state of their origin, until actually started in the course of transportation to the state of their destination, or delivered to a common carrier for that purpose, *provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation or intended exportation,* and that the carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. Now the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a state. In the one case the words are, 'No tax or duty shall be laid on articles exported from any state.' Art. I, Sec. 9, par. 5. In the other they are, 'No state shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. I, Sec. 10, par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their exportation, is not within the constitutional prohibition."

Turpin vs. Burgess, 117 *U. S.* 506.

The two cases last cited have been distinctly followed in the recent case of Cornell vs. Coyne, 192 U. S., 426. In this case, the court says:

"The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."

The holding of the court in this case is to the effect that property or goods manufactured with the intention of exporting the same cannot, by such intention, be exempted from the *ordinary burdens* of taxation applicable to all like property in the state. The cases above quoted are approved, wherein the principle is laid down absolutely that articles cannot be specially taxed, simply by reason of, or because of, their intended exportation. That is precisely what the law of New Mexico of 1901, does. It undertakes to enforce an examination, called an inspection, with a tax of 10 cents incidental thereto, at the port of shipment, only upon hides offered for export beyond the limits of the Territory. It is said that this is to detect crime; yet no similar efforts to detect crime are made by the law upon hides designed for local commerce. It is suggested in the opinion of the New Mexico Supreme Court in this case that in inspecting slaughter houses under the older statutes, the inspector might follow this law of 1901 and charge the fee of 10 cents. But in this the court was clearly under a misapprehension. The inspection of 1901 requires the taking of data which can only exist at the port of shipment—the name of the shipper. A hide reposing in a slaughter house could not be inspected, so as to reveal the name of a shipper, nor could the inspection fee be there earned, because it would have no shipper within the meaning of the law of 1901 until brought to a common carrier, and offered for con-

signment to some point outside the Territory of New Mexico. But even if slaughter house hides are chargeable with this tax, it is recognized by the Supreme Court of New Mexico, in its opinion, "That large numbers of cattle are killed in this Territory by people not in slaughter houses, and it cannot be said, therefore, that a tax of 10 cents per hide is levied upon each hide in the Territory." It is, therefore, apparent that this 10 cent tax is an unusual tax not levied upon all property in the same class, but levied only on that portion of the hides of New Mexico which are offered for exportation by a common carrier; and although the law does not say, on its face, that it is taxing these hides simply because of their exportation, still it is apparent that that is the only purpose or reason for the taxation. It cannot be said that the object is to detect crime, when the Legislature discriminates in favor of local commerce and shows no disposition to detect crime at the expense of local industry.

The case of Turner vs. Maryland, 107 U. S., page 38, was much relied upon by opposing counsel, to establish the proposition advanced by them, that a state can arbitrarily destroy an article produced within its borders, and deprive it of becoming the subject of commerce, by the enactment of inspection laws. The object of the Maryland Statute plainly was to give an inspection which would benefit the article inspected, and which would give to the packages of tobacco a certificate by the state as to their character, quality and weight. An inspection fee was charged for this classification. It is submitted that this case would have been entirely different in its theories and result, if, for instance, a fee had been charged by the state, for looking over the tobacco, without certifying or classifying it in any way,

for the purpose of determining whether or not any evidence could be found therein, to assist in the prosecution of offenses against some entirely different kind of property. It is also apparent in the case of Turner vs. Maryland, that the inspection fee charged was not levied because of the intended exportation of the tobacco, but because of the benefit done to the tobacco in the markets of the country by having the state certify to its quality and class. There is no parallel for this in the New Mexico law. The tag attached by the hide inspector certifies nothing, as to weight, quality or security of title. It simply shows that the hide has paid the exportation tax into the funds of the Cattle Sanitary Board. The Maryland law was essentially a law drawn for the purpose of inspection; the New Mexico law has no features in common with it, and cannot be classified as an inspection law along with that in the Maryland case. In this case, the court said:

"The contention of the plaintiff in error is, that a law which otherwise would be an inspection law ceases to be such if no provision is made for opening the package containing the article and examining the quality of its contents. On this subject the Maryland court held that, in order to constitute an inspection law, an examination of the quality of the article itself is not necessary; but that to prepare the products of a state for exportation, it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions, either on account of the nature and character of such products, or to enable the state to identify the products of its own growth, and to furnish the evidence of such identification in the markets to which they are exported. In opposition to these views, which appear to us to be sound, we are asked to hold that the provisions under consideration do not fall under the head of inspection laws, in a case where the question is presented, without the finding of

any facts, to show what may be thus necessary in regard to a product is not necessary in regard to tobacco, and with every presumption to the contrary, arising out of the course of legislation as to the inspection of tobacco, by the state of Maryland. The Legislature of the State of Maryland from the earliest history of the colony, and since the formation of the State Government, has made the inspection of tobacco raised in that state compulsory. That inspection has included many features, and has extended to the form, size and weight of the packages containing the tobacco as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the state, and thus preserving the reputation of the article, in markets outside of the state, is a legitimate part of inspection laws, and the means prescribed therefor in the statutes in question, naturally conduce to that end. Such provisions as parts of inspection laws, are as proper as provisions for inspecting quality; and it cannot be said that the absence of the latter provisions, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be inspection laws. It is easy to see that the use of the precaution of weighing and marking the weight on the hogshead and recording it in a book, is to enable it to be determined at any time whether the contents have been diminished subsequently to the original packing, by comparing a new weight with the original marked weight, or if the marked weight be altered, with the weight entered in the warehouse book. The things required to be done in respect to the hogshead of tobacco, in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce, or commerce among the states, and are to be done before it becomes such an article. They are properly parts of inspection laws, within the definition given by this court in Gibbons vs. Ogden, 9 Wheat., 1."

This is a leading case on this subject and if there

can be pointed out one single function performed by the New Mexico Statute, which is like the Maryland law, we shall be glad to see it. As a matter of fact, the New Mexico law is not an "inspection law," within the meaning of that term as recognized by any court.

III.

THE NEW MEXICO STATUTE IN QUESTION UNDERTAKES TO IMPOSE A TAX, CHARGE AND DUTY UPON ONE CLASS OF PROPERTY AND UPON ONE LINE OF INDUSTRY, FOR THE SOLE PURPOSE OF PROTECTING ANOTHER CLASS OF PROPERTY AND A DISTINCT AND DIFFERENT LINE OF INDUSTRY.

To impose a discriminating and special tax on the property of one class of citizens, as upon butchers, or hide dealers, or upon one kind of property, as upon hides, to protect the property of another class of citizens, as cattle raisers, or another kind of property, as cattle, is in violation of fundamental principles of government, and natural right.

It takes private property for private use without compensation. It deprives the despoiled citizen of the equal protection of the laws.

" 'It may well be doubted,' said Chief Justice Marshal, in Fletcher vs. Peck, 'whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the transferring

of the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection. It is the particular province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society; would seem to be the duty of other departments.' And Chief Justice Chase adds, with great force: 'And if the property of an individual cannot be transferred to the public, how much less to another individual?'

"'It violates that fundamental principle of all just legislation, that the legislatures shall not take the property of A and give it to B.'

"'No court for instance,' said the late Justice Miller, in Loan Association vs. Topeka, 'would hesitate to declare void a statute which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. Of all the power conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited.' And then follow these weighty words: 'To lay with one hand the power of government on the property of the citizen, and with the other bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation.'

He then quotes the language of Judge Cooley: 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.'

"Judge Cooley says: 'Levies for Private Purposes —Where, however, a tax is avowedly laid for a private purpose, it is illegal and void. The following are illustrations of taxes for private purposes: A tax levied to aid private parties or corporations, to establish themselves in business as manufacturers; a tax the proceeds of which are loaned out to individuals who have suqered from a great fire; a tax to supply with provi-

sions and seed such farmers as have lost their crops; a tax to build a dam which, at discretion, is to be devoted to private purposes; a tax to refund moneys to individuals which they have paid to relieve themselves from an impending military draft; and so on. In any of these cases the public may be incidentally benefited, but the incidental benefit is only such as the public might receive from the industry and enterprise of individuals in their own affairs, and will not support exactions under the name of taxation.'"

1 *Tucker on the Constitution*, 77.

To this proposition we further quote: "Of all the powers conferred on government that of taxation is most liable to [illegible]. The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people. It was said by Chief Justice Marshal, in the case of McCollough vs. the State of Maryland, "That the power to tax is the power to destroy." Loan Ass. vs. Topeka, 20 Wall 665.

Tested by these principles, even if the ten cents tribute per hide exacted by law was all expended in the protection of the cattle in the Territory against theft, which is not the case, upon what theory can it be justified?

To protect property against loss by fire is undoubtedly a proper exercise of the police power. To tax my property for the purpose of insuring my neighbors, or to remove inflammable material which might set fire to my neighbor's house, is not a proper exercise of the powers of government. To tax residences, to detect, apprehend and punish the incendiary of railroad property, is not a proper exercise of either the police power, or the power of general taxation. Nor is the principle at all changed by levying a tax on one class of property

for the benefit of another class. The court below seems to have concluded that the police power being as broad and plenary as the taxing power, and as the taxing power was all pervading, any act the legislature might pass could be justified. As we have already shown, Congress excepted taxes which operate as export duties on interstate commerce from both the general power of taxation and the police power, unless within the proper scope of inspection laws.

Again we repeat, these so-called inspection fees are not exacted under the general taxing power. It is under the police power, and the Constitution prohibits such an exercise of the police power, unless authorized by the exception in the Constitution.

IV.

THE NEW MEXICO STATUTE IN QUESTION IS NOT A REASONABLE LAW, PROPERLY DEVISED FOR PREVENTING THE EVIL AT WHICH IT MAY BE AIMED, IF IT IS AIMED AT ANY EVIL; AND NOT SO DEVISED AS TO NO MORE THAN EFFECTUATE THAT PURPOSE.

As stated in the Mugler case, 123 U. S., 623, to be valid as an inspection law, "It must be a reasonable law, properly devised for preventing the evil at which it is aimed; so devised as to no more than effectuate that purpose, and as not to subserve other objects unessential to the public safety." It is respectfully submitted that the law of New Mexico, under discussion in this case, bears no reasonable connection with the detection of crime, nor with any usual purpose of inspection laws;

and that it is furthermore unreasonable and unfair in its operation, and in its discrimination against and imposing difficulties upon interstate commerce, making no similar restrictions upon local commerce.

"To justify a state in thus interposing its authority in behalf of the public, it must appear, first, that the interest of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

From the opinion of the court, by Mr. Justice Brown, in Lawton vs. Steele, 152 ,U. S., 137

Quoting from

Henderson vs. New York, 92 *U. S.*, 259.

Railroad Co. vs. Husen, 95 *U. S.*, 465.

Chy Lung vs. Freeman, 92 *U. S.*, 275, with other citations.

Also:

"In all these cases (the court says) the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical prohibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

In Lake Shore & M. S. Rd. Co. vs. Ohio, 173, U. S., 300, the court says:

"In what has been said we have assumed that the statute is not in itself unreasonable; that is, it has appropriate relation to the public convenience, does not

go beyond the necessities of the case, and is not directed against interstate commerce. In Railroad Co. vs. Husen, 95 U. S., 465, reference was made to some decisions of state courts in relation to statutes prohibiting the introduction into a state of cattle having infectious disease, and in which it was contended that it was for the legislature and not for the courts to determine whether such legislation went beyond the danger to be apprehended and was therefore something more than the exertion of the police power. This court said that it could not concur in that view; that as the police power of a state cannot obstruct either foreign or interstate commerce 'beyond the necessity for its exercise,' it was the duty of the courts to guard vigilantly against 'needless intrusion' upon the field committed by the Constitution to Congress. As the cases above cited show, and as appears from other cases the reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court, whether such legislation encroaches upon national authority or is to be deemed a legitimate exertion of the power of the state to protect the public.

(Railroad Co. vs. Husen, 95 U. S., 465, so often cited:)

"While we unhesitatingly admit that a state may pass laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into and through the state, beyond what is absolutely necessary for its self-protection. The police power of a state cannot obstruct foreign or interstate commerce beyond the necessity for its exercise; and as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

The conditions of trade under which interstate commerce is transacted in this particular industry are

matters which cannot be ignored by legislatures in dealing with established customs and industries. When the legislature of New Mexico sought to levy a tax, enforcible in an unusual way upon an honest and legitimate article of commerce, at a particular time, namely when that article was offered for consignment beyond the limits of the Territory, it is important, in determining the validity and good faith of that law to determine whether or not it was reasonable, both in its language and in its operation, and to determine, secondly, whether it was reasonably capable, under the fixed conditions of said trade, and the necessary conditions to the existence of said trade, of accomplishing the legitimate and usual ends of the class of laws known as "inspection laws."

The writ of mandamus, with all the allegations therein, is taken as confessed in this proceeding and the court's attention is particularly called to the following six paragraphs of fact alleged in said writ, and admitted as true:

"k. That the said pretended inspection is impossible of execution under the established customs and usage of interstate trade in hides, for the reason that at the time when said hides are offered for shipment and the necessity for inspection under the said act attaches, the said hides are (by the customs of trade and in order to secure advantageous freight rates, so that the said commerce may be carried on and the hides of New Mexico may be marketed in the markets of the world on equal terms with the hides of other portions of the United States of America), first compressed by machinery into a hard and compact mass, getting the greatest possible weight into the smallest possible compass, and then bound and baled by wire, in such compressor, in bales containing from thirty to one hundred and fifty hides, and so offered for shipment, the intent

being to get the greatest possible number of hides into a car such as is commonly used by railroad companies, and such course being necessary by reason of the close competition in hides throughout the said United States and the necessity for economy in their shipment and marketing, in modern business methods, and such compression of hides being practiced by all shippers throughout the country, in order so to compete in marketing the same; that by the terms of said statute, it is thereupon attempted to impose upon the railroad company or common carrier, by criminal responsibility, the duty of examining minutely each hide which has been so packed, baled and wired as preliminary to its offer for shipment, to ascertain whether or not each of such hides bears an inspection tag, no provision being made by said law for the tagging of any bale of hides, nor for the issuance of any certificate of inspection thereon; that, to comply with the said statute, the customs and methods of trading and exporting hides would be utterly destroyed and ruined, in the opening by said railroad company or common carrier of such bales, thereby releasing compression thereon and necessitating another compression of said hides for shipment, at the warehouses of said relator, and a rebaling of the same for shipment; whereupon, it would again be impossible for the said common carrier to know whether or not the hides contained in said package, so rebaled, were tagged or inspected or not, though such common carrier would again be held to criminal responsibility in the premises.

"l. That the larger portion of the hides produced in New Mexico and Arizona and by said relator stored in New Mexico and shipped, at advisable times to the general hide markets of the country, are marketed in the cities of Chicago, New York and Boston; that the proximity of manufactories for the working of leather, and tanneries for the tanning of the same, and forests producing bark for the making of tannic acid, necessary in the working of such hides into leather, have established these three cities as the centers of commerce in hides in the United States of America; that the market

value and price of hides in said cities fluctuates, as does that of any other general commodity produced by industry and marketed in the course of interstate commerce, in the United States of America, and that it becomes therefore, and is, important to the buyers of hides and shippers thereof, all through the country including such hides in competition with similar dealers and traders throughout the United States, to know by telegraphic advices the prevailing price of such hides from day to day and the market fluctuations thereof, and immediately at such times as may be advantageous and advisable, to market such hides by telegraphic bargains and sale, and to contract for the immediate delivery thereof, in said cities of Chicago, New York and Boston, by fast transportation as soon as the same may, by the use of modern business methods and railroad facilities, be accomplished; that, not to observe these conditions and transact business as rapidly as possible, utilizing all the facilities of modern commercial usage, would be to fail utterly to get the hides so produced in New Mexico and Arizona, into the said markets, and would result in the abandonment of interstate dealings in hides, so far as the producers of hides in the Territory were concerned; that by the terms of said inspection law, no time is specified for inspection, nor is the said Cattle Sanitary Board nor any inspector placed under any legal obligation to make inspection at any time, or with any diligence, nor is any remedy provided or given to relator by which the inspection of such hides by said board or its officers can be compelled at any time or place, nor is any remedy given the shipper for the utter failure of said board and its officers to do their duty in his behalf at any time, nor are the said hides made subject to taxation in any sense until the same are offered for extra-territorial shipment; that in consequence thereof, it is impossible for relator promptly or in a business like way, or in equal competition with other dealers throughout the United States to market his said hides, but when relator may have concluded to ship the same, it would become necessary, under the

operation of said law, to await the pleasure and convenience of the inspectors of said Cattle Sanitary Board, gathered from all the various districts of the Territory of New Mexico, to inspect and tag the said hides so as to qualify the same for shipment; that in these matters and things the said law is impractical, unenlightened, and barbaric in its disregard of the necessity of modern business methods, and a gross and ruthless interference with interstate commerce.

"m. That the said law is unequal in its imposition upon extra-territorial shippers of hides of infinite delay in the inspections of their hides, until the pleasure or convenience of the inspectors, whereas butchers and slaughterers of cattle within the Territory of New Mexico are only required to hold the same for inspection for thirty days after killing; it being further the fact that each and all of the hides so offered for shipment by relator are of the class known as "dry hides" and necessarily of the age of from thirty to sixty days or more, and that a large percentage of them have come from the hands of butchers who have held them for inspection the thirty days required by law.

"n. That the sad law interferes with interstate commerce in requiring the holding of hides designed for extra-territorial shipment, until the same have been inspected at the pleasure and convenience of the Cattle Sanitary Board, and discriminates against interstate commerce in so providing and in requiring a tax or charge to be paid thereon, and in providing the limited term of thirty days for the inspetcion of such hides when in the course of local trade, and in not requiring any fee or charge thereon.

"o. That the pretended inspection provided for by said act is without purpose or object as an inspection law, requiring only the keeping of a memorandum of the brands and the name of the shipper, otherwise called the purchaser, which data can have no legal efficacy for the protection of the health or property or safety of the people of the Territory of New Mexico; that no provision is made for the withholding from shipment of

any unbranded hides or of any hides which the inspector may have reason to believe have been dishonestly taken by any person, or for the withholding of any hides which may appear to be infected in any way, but the same are entitled to be tagged and shipped, that instead of protecting the property, health, morals or safety of the people of New Mexico, the said law thus facilitates the exportation of stolen or infected hides, which being tagged are entitled to be taken beyond the boundaries of the Territory of New Mexico by railroad or common carriers, and are always, without tags or inspection, permitted to be taken beyond said boundaries by private exportation; that the keeping of a record of the brands and the name of the shipper affords no conceivable remedy to the original owner of such hide, nor to any intermediate owner, in case the same has been stolen from him, nor does it avail him anything to be able to trace the property so stolen to any outgoing freight car carrying the same away from New Mexico as no record of the consignee is required to be kept; nor does the said act on the other hand afford any assistance in the detection of any possible thief of such hide in the Territory of New Mexico, inasmuch as no record of the person who sold the hide to the shipper is required to be kept, or can be legally exacted under such law, nor does such enactment in any way aid or give assistance to any section or article in the penal code of the Territory of New Mexico; wherefore the said statute utterly and entirely fails to establish a police regulation of any efficacy whatever, but simply makes an indefinite memorandum of useless facts, containing the fact that the shipper named has exported from the Territory a certain number of hides, bearing certain brands, or bearing no brands at all, and which said hides, may have originated in the Territory of Arizona, the Republic of Mexico, the State of Colorado, the States of Texas, or the Territory of New Mexico, and which said hide may have been in the possession and in the warehouse of said shipper for any term or period from thirty days to about a year.

"p. That the said inspection law is incapable of due or reasonable execution for the reason that when hides have been stored, as is customary in trade therein, in warehouses, the same are classified by their quality, and the place of their origin is lost sight of, whence it becomes impossible to tell in what district of New Mexico said hides may have originated or whether in New Mexico at all; and for the further reason that in bartering and trading from hand to hand throughout the country said hides are often times exposed to the weather, and become hard and damaged thereby, and it becomes impossible in many instances for any inspector or other

See Trans. pp. 7, 8, 9 *and* 10.

person to decipher the brand thereon."

A statute may be void by reason of its operation, although valid on its face.

"And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous, where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts, prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

Virginia Coupon Cases, 114 *U. S.*, 295.

The attention of the court is also called to the following cases discussing the question of the reasonableness of such laws, both in their language and their operation:

Brimmer vs. Rebman, 138 *U. S.*, 78.
In re Rebman, 41 *Fed. R.*, 867.
Walling vs. Michigan, 116 *U. S.*, 446.

A specific tax obliging mining companies to pay more upon mineral obtained in the state, and exported before it is smelted, than on that which is smelted within the state, is a tax on interstate and foreign commerce, and is void.

Jackson Mining Company vs. Auditor General, 32 Mich. 488.

V.

THE LAW IN QUESTION, IN CHARGING A FEE OF TEN CENTS PER HIDE, FOR AN INSPECTION MADE AS WE CONTEND AT THE PORT OF SHIPMENT, WHERE HIDES MUST BE ASSUMED TO BE IN EXISTENCE IN SHIPPING QUANTITIES, OR CARLOAD LOTS, IMPOSES A CHARGE WHICH IS APPARENTLY LARGELY IN EXCESS OF THE COST OF SUCH INSPECTION.

In the writ in this case, it is alleged:

"i. That said pretended fee or charge is largely in excess of the amount of fee or charge which might be absolutely necessary for the making of an inspection such as is required by said pretended enactment, it being the fact that hides as aforesaid are gathered for exportation, in carload lots, in the said towns of Albuquerque, Santa Fe and Las Vegas, and that shipments are made from said points about twelve to fifteen times per year, on an average; that at such times there are on hand for shipment large numbers of hides, varying from 1000 to 3000, and that the same can be inspected at the rate of at least 400 per day, before being baled and compressed for shipment as hereinafter stated; that at such rate of inspection the amount of such inspection

fees would be at least forty dollars per day, whereas the fees and compensation of an inspector of the Cattle Sanitary Board are fixed by law at $2.50 per day, and necessary expenses, which said expenses could not exceed $5.00 per day i nthe discharge of his duties."

Trans. p. 6.

In the opinion of Associate Justice Pope, at folio 53 of the transcript herein, this allegation is discussed, and the learned judge italicizes the word "might" in the second line above, arguing that the same makes the allegation not a positive one. In passing, it is respectfully submitted that the word "might" in this connection means "could," and that the allegation is simple and direct to the effect that the fee charged is more and a great deal more than could in any event be considered as the necessary expense or cost of the inspection, under the circumstances under which the inspection of hides tendered for export is made. Judge Pope says in his opinion that "Relator overlooks the fact that there may be days when the inspector inspects only a few hides, instead of 400, and yet with the same expenses and per diem." it is not reasonable or even possible under the alleged conditions governing this trade, to assume that a few hides will ever be offered for export. It is distinctly averred that hides are only exported in carload lots.

"All pleadings must be construed reasonably and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged(although its existence is fairly, naturally and reasonably to be presumed from the averments in the pleadings."

Lockhart vs. Leeds, 195 *U. S.*, 435.

By the report of the Governor of New Mexico to the 36th Legislative Assembly, dated January 16th,

1905, and the Report of the Cattle Sanitary Board thereto attached, it appears, for illustration, that during the five months from July to November, 1904, inclusive, the total receipts from hide inspection were $1110.38. The disbursements of the board for the same period contain only three items which could be properly be charged in part to the inspection of hides, namely, stationery and postage, $85.80; salary of secretary, $333.48; and general expense account, $766.22; making a total of $1185.10. But it is apparent that the larger portion of these items should be charged to funds derived from the other functions of the board. By Section 222, Compiled Laws of 1897, "All inspection fees and charges shall be paid to the Secretary of said Board who shall transmit the same to the Territorial Treasurer to be placed to the credit of the Cattle Indemnity Fund." This is the general fund into which all the revenues for the support of this board are put. Out of this fund are paid all the expenses of the board, in connection with its primary quarantine duties, the salary of its veterinary surgeon, the salary of its cattle inspectors, all expenses concerning the enforcement of quarantine, the sale of condemned cattle, the keeping of record books concerning cattle, the payment of indemnities for slaughtered cattle, and other expenses shown by the laws authorizing them to be entirely disconnected with the business of inspecting hides or of keeping a record of the brands thereon. It seems to us that the allegation quoted, to the reasonable effect that the income from hide inspection is greater than the cost might possibly be, was certainly sufficient to justify an inquiry, upon issue joined, as to the truth of said allegation. The cases already cited show conclusively that when the tax imposed is diverted to any other purpose, then that

which "May be absolutely necessary for executing the inspection laws," the statute is void. It becomes at once stamped as a revenue law, instead of a legitimate inspection law, confining its charges to the actual necessities of the inspection.

By reference to Section 203 of the Compiled Laws, it will be seen that it is paid out to the veterinary surgeon, the attorneys, salaries for officers of the Board and for indemnities to cattle. By a reference to the annual printed report of the Cattle Sanitary Board for the year 189), the Board received $15,866.29, out of which $8,707.32 was paid to inspectors, and $3,370.76 was paid for other expenses of the Board. For the year 1900 the Board received from various sources $15,875.29, out of which it paid for inspections $9,288.36, and $6,008.78 for other expenses of the Board, clearly showing that a large part of its revenues were paid out for expenses other than inspection fees.

The findings of the Court in its opinion and the admissions made by the demurrer substantiate this state of facts.

This was the situation in the case of American Fertilizing Company vs. Board of Agriculture of North Carolina, 43rd Federal Reporter, 609; in which case it appeared that the statute exacting the license did not confine its charge to the legitimate expenses of the inspection. In the later case of Patapsco Guano Company vs. North Carolina, 171 U .S., the following significant language, concerning the state of the statutes in the former decision, was used:

"We agree entirely with the Circuit Court that the Legislation of 1891 not only amended the Code in the matter of the requirement of the privilege tax of

$500.00, but repealed all laws making any substantial diversion of the money to be derived from the charge on fertilizers of twenty-five cents per ton, to any other purposes than those connected with the necessary expenses of inspection."

In considering the Patapsco case, it must be borne in mind that the law concerning the inspection of fertilizers, was a law which contained actual features of inspection of the article, determining its character and quality, and classifying it and certifying it for the market. The good faith of the statute was apparent; the good faith of the statute of New Mexico is not apparent from its face, because it contemplates no legitimate inspection, nor does it fairly indicate an intent to detect crime, because it makes no similar effort to inspect hides as a prerequisite to local commerce. The use made of the fund, that is to say, the putting of the fund into the Cattle Indemnity Fund, is a circumstance to be taken in connection with all others, to show the object of the statute, as a law for the production of revenue, rather than a law for any recognized class of inspection. The same difference in the apparent objects of the law is discernible in the case of Neilson vs. Garza, 2nd Woods, 287, which has been much relied upon by opposing counsel. The opinion in that case, comes back to the original question as follows:

"Then we are brought back to the question whether the law is an inspection law. If it is, we cannot interfere with it on account of supposedexcessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods . . . The law creates the office of inspector, to be elected by the voters of the county; it requires of him a bond and oath of office; it requires him to keep a book of records of his inspections; it requires him to examine and inspect all hides

or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment; and all animals driven or sold in his district for slaughter to packeries or butcheries; it directs the method of inspection, branding and recording, animals and hides; it requires him to prevent the sale or removal out of the county of hides or animals upon which the brands cannot be ascertained, unless identified by proof, etc.; it gives him power to seize and condemn unbranded animals or hides. Various other regulations are imposed in the act."

It is apparent that this was much more clearly a bona fide inspection or examination, than the New Mexico Statute.

It is believed that the diversion of the said funds from the legitimate expenses of inspecting, is well pleaded and set forth in the following paragraph of the writ, in this case:

"j. That said pretended fee or charge so imposed upon interstate commerce is not by law used to cover the expenses of said inspection, nor paid to said inspector for his per diem or expenses, but is directly by law attempted to be appropriated to the general fund for the support of the said Cattle Sanitary Board in all its functions, the said fund being known as the Cattle Indemnity Fund, out of which the said board pays: the compensation of the veterinary surgeon employed by it, not more than $1500.00 per year and actual necessary expenses, the duties of which said official relate exclusively to quarantine and health service and are confined to cattle, and have nothing to do with hides; the compensation of assistants employed by said board, at $2.50 per day and expenses, their duties being generally in quarantine service and the inspection of slaughter houses; the compensation of other assistants who may be requisite, under Section 190 of the Compiled Laws of 1897, in the sanitary protection of cattle, whose duties have naught in common with the inspectionof hides; the actual and necessary expenses of the

sessions of the Cattle Sanitary Board and the expenses for books and records necessary under the quarantine regulations, and for salary of secretary; expenses incurred in the slaughter of infected animals, under the quarantine regulations, and for burning the carcasses thereof; all indemnities to owners of cattle for cattle destroyed under the quarantine statutes; expenses for inspecting slaughter houses and general expenses of said board, whereby the said inspection fee or charge assessed against hides, designed for extra-territorial shipment by railroad or common carrier, becomes purely a tax for general revenue purposes, and not solely or exclusively for the making of the inspection therein mentioned."

Trans. p. 6.

It will be remembered that the Cattle Sanitary Board was already in existence, performing all its functions, in reference to cattle, and quarantine, before the passage of the present law; that the salaries of the officers have not been increased, to cover any extra labor they may perform in keeping on file the reports of the inspectors of exported hides, and that the only expense contemplated by the law, in such inspection of hides, is the salary of the inspector, at $2.50 per day, and his necessary expenses, alleged in the writ not to exceed $5.00 per day in all.

In determining whether or not it was reasonable or necessary to charge a fee of ten cents each for the inspection of hides offered for shipment, or whether such a tax was disproportionate to the actual expense, the court is respectfully referred to the fact that by the statutes of the Territory concerning the inspection of cattle on the range, the reasonable fee chargeable therefor is fixed at three cents per had (Setion 2, Chapter 63, page 106, Session Laws of New Mexico of 1899). Certainly the inspection of live animals, taking data as to

their brands and markings, as they are running in the herd, is a much more difficult and expensive piece of work than the inspection of hides gathered in large quantities at railroad stations, easily accessible to the inspector. This is but another illustration of the discrimination which has resulted in this Territory, from the influence of the cattlemen, who have apparently been able to cause the legislature to overtax other property and other industries, for the support of their Cattle Sanitary Board.

VI.

THIS STATUTE IMPOSES THE BURDEN OF INSPECTION, AND THE PAYMENT OF TEN CENTS PER HIDE, ONLY UPON HIDES OFFERED TO A COMMON CARRIER FOR SHIPMENT TO A MARKET WITHOUT THE TERRITORY.

It is therefore a clear discrimination between hides to be retained and used in the Territory and hides to be shipped out. Hides may also be shipped out of the Territory by any other means of transportation than a common carrier. It would be difficult to suggest a reason for a discrimination between the two or three classes of hides. It is conceivable that the promoters of this law may have thought that, if hides could not be shipped out of the Territory, tanneries, shoe, harness, saddle, and other plants for the utilization of leather might be established in the Territory. It may not have occurred to them that under the Constitution of the United States, which was finally made an accomplished fact to prevent just such aspirations and discrimina-

tions, Colorado and Kansas have just as much right to the products of New Mexico as New Mexico to those of Kansas. President Diaz, a short time ago, by one stroke of his pen, set aside all import duties on corn coming in Mexico, in the interest of consumers. The effect was the end of the "corner." We do not rely on such exercise of authority, we do rely on our Constitution and the laws. The untrammeled interstate commerce of our country is what made our Constitution, and the greatness of our country. Any law in controversion of it is to be tested, not by "intentions," but by "possible effects." The power to tax is the power to prohibit and destroy.

McCullough vs. Maryland, 4 *Wheaton* 316.

We contend that this is a discriminating law—hides to be shipped out of the Territory are subject to this duty, hides not to be shipped out are not subject to it.

"The law in question is a discriminating law, and requires the inspection of flour brought from other states, when such inspection is not required for flour manufactured in Virginia. The aspect of the case brings it directly within the principle of Brimmer vs. Rebman, 138 U. S., 78, decided at the present term, etc."

Voight vs. Wright, 141 *U. S.*, 65.

Is there or can there be any difference between a discrimination against "importation" or "exportation?" Is the right to export not as sacred as the right to import? Can the people of one state import from another state, unless the people of the latter state can export? Here we have, however, the agent of the importer in one state prevented by an unconstitutional statute from exporting from New Mexico to his principal, who is seek-

ing to "import" into the State of Colorado.

We respectfully submit that the judgment of the court below should be set aside, and the writ granted as prayed for.

All of which is respectfully submitted.

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